Nos. 02–1574 & 02–1624

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING PETITIONERS

GERALDINE R. GENNET
General Counsel
Counsel of Record
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN
Senior Counsel
DAVID PLOTINSKY
Assistant Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel

Office of General Counsel
United States House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225–9700

MAY 30, 2003

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Importance of the Issue Presented	4
II. Conflict Between United States Courts of Appeal	9
III. Conflict With Statements of This Court	10
CONCLUSION	12

Page

TABLE OF AUTHORITIES

Cases

Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) 2
County of Allegheny v. ACLU, 492 U.S. 573 (1989) 10
Engel v. Vitale, 370 U.S. 421 (1962) 10
Lynch v. Donnelly, 465 U.S. 668 (1984) 10
Morrison v. Olson, 487 U.S. 654 (1988) 2
Newdow v. Congress of the United States, No. S–01–1924 (E.D. Cal. Aug. 8, 2002) 3
Newdow v. Eagen, No. 1:02CV01704 (D.D.C. filed Aug. 27, 2002) 3
Newdow v. United States, No. 98–6585 (S.D. Fla. Dec. 1, 1998), *aff'd*, 207 F.3d 662 (Table) (11th Cir. 2000) 3
Raines v. Byrd, 521 U.S. 811 (1997) 2
Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993) 9
United States v. Bajakajian, 524 U.S. 321 (1998) 9
United States v. Edge Broad. Co., 509 U.S. 418 (1993) 9
United States v. Eichman, 496 U.S. 310 (1990) 2
United States v. Gainey, 380 U.S. 63 (1965) 9

Constitution and Statutes

U.S. CONST. art. 1, §6, cl. 1 2
Pub. L. No. 623, Ch. 435, §7, 56 Stat. 380 (1942) 5
Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) 5
Pub. L. No. 107–293, §2(b), 116 Stat. 2057 (2002) 8

Rules

Rule XIV.1, Rules of the U.S. House of Representatives (108th Cong.) 3
SUP. CT. R. 10 3

Page

Rules—Continued

SUP. CT. R. 10(a) 4, 9
SUP. CT. R. 10(c) 3–4, 10

Legislative Materials

100 CONG. REC. 7761 (1954) (statement of Rep. Keating) 5
100 CONG. REC. 7761 (1954) (statement of Rep. O'Hara) 6–7
100 CONG. REC. 7763 (1954) (statement of Rep. Wolverton) 6
100 CONG. REC. 7764 (1954) (statement of Rep. Rodino) 6
100 CONG. REC. 7765 (1954) (statement of Rep. Laird) 6
145 CONG. REC. S6801 (daily ed. June 9, 1999) (statement of Sen. McConnell) 4
148 CONG. REC. H4128 (daily ed. June 27, 2002) (statement of Rep. Weldon) 7
148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Kleczka) 2
148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays) 2, 7–8
149 CONG. REC. H1980 (daily ed. March 19, 2003) (statement of Rep. Boozman) 4
H. REP. NO. 1693 (1954) 8
H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted) 3, 7
H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted) 3, 8, 9
H. Res. 132, 108th Cong., 149 CONG. REC. H1977 (daily ed. March 20, 2003) (enacted) 8
S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (enacted) 7
S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. March 4, 2003) 8

Miscellaneous

John W. Baer, *The Pledge of Allegiance: A Centennial History 1892–1992* (1992) 5
App. to Pet. for Cert. 2, 10

Nos. 02–1574 & 02–1624

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully submits this brief as amicus curiae supporting the petitions for a writ of certiorari

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus curiae and its counsel has made a monetery contribution to the preparation or submission of this brief.

in this case.[2] The Bipartisan Legal Advisory Group represents the institutional interests of the House in judicial proceedings, and it and its predecessors have often appeared before this Court where such institutional interests were at stake.[3]

When this case was initially filed, Congress (but not the House and Senate individually) was named as a defendant. The Ninth Circuit held that Congress was not a proper defendant because "in light of the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation." App. to Pet. for Cert. at 5a. However, even though Congress was not a proper defendant, it clearly is appropriate for the House, through its Bipartisan Legal Advisory Group, to appear as amicus curiae before this Court because of the House's strong interest in this case.

The House's interest in this case stems from the unique and vital place of the Pledge of Allegiance in the civic life of this Nation. "The Pledge of Allegiance is a revered expression of patriotism recited by millions of citizens every day. When it is spoken, it instills support for the United States and reflects the love that Americans feel for their country." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Kleczka). Indeed, it is almost impossible to overstate the Pledge's importance to the American people for whom it "is not a prayer [or] part of a religious service . . . [but rather] a statement of our commitment as citizens to our great Nation." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). Long before this case was filed, the House recognized the significance and vitality of the Pledge by pro-

---

[2] The Bipartisan Legal Advisory Group consists of the Speaker of the House, the Majority Leader, the Majority Whip, the Minority Leader and the Minority Whip.

[3] *See, e.g., Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *United States v. Eichman*, 496 U.S. 310, 311 (1990); *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 154 (1989); *Morrison v. Olson*, 487 U.S. 654, 659 (1988).

viding for its recitation near the beginning of each session of the House. *See* Rule XIV.1, Rules of the U.S. House of Representatives (108th Cong.) (third item in "daily order of business" is the "Pledge of Allegiance to the Flag"). More recently, the House adopted, by overwhelming bipartisan majorities, two resolutions condemning the decision below and expressing support for the Pledge as written. *See* H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted); H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). In so doing, the House was clearly giving voice to the sentiments of an overwhelming majority of Americans.

For these reasons, it is appropriate for the House, both because of its own institutional interests and as the elective body that most directly represents the views of the people of this Nation, to appear in this case as amicus curiae in support of the petitions for certiorari.[4] Accordingly, the Bipartisan Legal Advisory Group of the House respectfully submits this brief.

SUMMARY OF ARGUMENT

This Court grants writs of certiorari "only for compelling reasons." SUP. CT. R. 10. One such reason is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal

[4] We note that this case is not an isolated piece of litigation, but rather is part of an all-out effort by respondent Newdow to eliminate any reference to "God" in our public life. In recent years, he has named Congress as a defendant in three other lawsuits, the first of which challenged references to God in the Pledge and the National Motto, and on U.S. currency; the second of which challenged references to God in congressional resolutions; and the third of which challenges the existence of congressional chaplains. The first two cases have been dismissed (*Newdow v. United States,* No. 98–6585 (S.D. Fla. Dec. 1, 1998), *aff'd,* 207 F.3d 662 (Table) (11th Cir. 2000); *Newdow v. Congress of the United States,* No. S–01–1924 (E.D. Cal. Aug. 8, 2002)), while the third is still pending (*Newdow v. Eagen*, No. 1:02CV01704 (D.D.C. filed Aug. 27, 2002)).

question in a way that conflicts with relevant decisions of this Court." *Id.* at 10(c). Another is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* at 10(a).

Review of the Ninth Circuit's judgment is warranted under these standards for three reasons. First, this matter is one of great importance. Second, the Ninth Circuit's judgment squarely conflicts with the judgment of another United States court of appeals. Third, the Ninth Circuit's judgment conflicts with oft-repeated statements by this Court that the Pledge of Allegiance is the type of government expression of the religious heritage, foundation and character of the Nation that does not offend the Establishment Clause.

ARGUMENT

I. Importance of the Issue Presented

Like the flag itself, the Pledge of Allegiance is an extraordinary and vital expression of our civic unity and, as such, occupies a unique and important place in American life. "Americans have expressed their reverence for the flag of this Nation and all it represents by reciting the Pledge of Allegiance." 145 CONG. REC. S6801 (daily ed. June 9, 1999) (statement of Sen. McConnell). "The Pledge of Allegiance brings together people of different backgrounds in a shared expression of support for our country." 149 CONG. REC. H1980 (daily ed. March 19, 2003) (statement of Rep. Boozman). Each day, the Pledge is recited by literally millions of Americans in schools, civic and political organizations, and legislative assemblies (including the House and Senate) all across the land. *See, e.g.*, 145 CONG. REC. S6801 (daily ed. June 9, 1999) (statement of Sen. McConnell) ("[H]undreds and thousands of civic organizations and schoolchildren have taken time before turning to their work to recite these moving words.").

The history of the Pledge further illustrates its important role in the civic life of the Nation. The initial version of the Pledge was composed for an 1892 national public school Columbus Day celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History,* 2 (1992). The author, Francis Bellamy, offered the following account of how and why he arrived at the phrase "One Nation, indivisible":

> Now how should the vista be widened so as to teach the national fundamentals? I laid down my pencil and tried to pass our history in review. It took in the sayings of Washington, the arguments on Hamilton, the Webster-Hayne debate, the speeches of Seward and Lincoln, the Civil War. After many attempts all that pictured struggle reduced itself to three words, "One Nation, indivisible." To reach that compact brevity, conveying the facts of a single nationality and of an indivisibility both of States and of common interest, was, as I recall, the most arduous phase of the task, and the discarded experiments at phrasing overflowed the scrap basket.

100 CONG. REC. 7761 (1954) (statement of Rep. Keating, quoting "A brief synopsis of the story of the origin of the pledge taken from the detailed narrative by Francis Bellamy, author of the pledge").

The Pledge underwent a number of alterations until it was officially codified by Congress in June of 1942, in the darkest hours of the Second World War. Pub. L. No. 623, Ch. 435, §7, 56 Stat. 380 (1942). Twelve years later, again at a critical juncture in our Nation's history—this time at the height of the Cold War, amid the tensions and uncertainty created by Stalin's death a year earlier—Congress amended the Pledge by adding the words "under God." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).

The 1954 Congress believed it vital that the Pledge reflect a distinction between the United States and the

communist Soviet Union. In the attempt to distinguish between the two countries, the legislators focused on the belief in God. *See, e.g.*, 100 CONG. REC. 7763 (1954) (statement of Rep. Wolverton) ("[O]ne of the greatest differences between the free world and the Communists[] [is] a belief in God.").

At the same time, in adding the words "under God" to the Pledge, the legislators were acutely aware of the place of those two words in our history. "These two words are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America." 100 CONG. REC. 7764 (1954) (statement of Rep. Rodino). Another Member of Congress said:

> I pointed out that this year our country celebrated the 145th anniversary of the birth of Abraham Lincoln. President Lincoln recognized that only under God could this Nation win a new birth of freedom. I would like to quote the last sentence from President Lincoln's Gettysburg Address: "It is rather for us to be dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this *Nation, under God,* shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

100 CONG. REC. 7765 (1954) (statement of Rep. Laird) (emphasis added).

The 1954 amendment was strongly supported by the American people. As one Member of Congress noted: "I have a profound interest in this subject matter stemming from the fact that some 2,000 or perhaps 3,000 of my constituents wrote me in support of this joint resolution. Those who wrote me came from all walks of life. Many

were children. It was by far the largest mail that I have received on any subject during the months of the 83d Congress." 100 CONG. REC. 7761 (1954) (statement of Rep. O'Hara).

This intense public interest in and support for the Pledge continues unabated to this day. The Ninth Circuit's ruling in this case produced an immediate national firestorm, and this controversy was reflected in the reaction of Congress. *See, e.g.,* 148 CONG. REC. H4128 (daily ed. June 27, 2002) (statement of Rep. Weldon) ("I believe that today the American people are clearly crying out, 'Overturn this decision.'"). The day after the initial Ninth Circuit ruling was issued, the House adopted a resolution, by a vote of 416 to three, affirming that "the Pledge of Allegiance and similar expressions are not unconstitutional expressions of religious belief." H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted). The resolution also urged the Ninth Circuit to "rehear this ruling en banc in order to reverse this constitutionally infirm and historically incorrect ruling." *Id.*[5]

In so doing, the House acknowledged the historical fact that religion has played an undeniable role in the founding and development of the Nation. "As a new nation we claimed our freedom from any monarch in the Declaration of Independence and inherently in the U.S. Constitution because of 'certain [inalienable] rights' guaranteed to us by our Creator." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). "President Abraham Lincoln, in his second inaugural address, spoke of God thirteen times, not in an effort to unite church and state but to unite our Nation at the conclusion of one of

[5] The Senate also adopted, by a vote of 99 to zero, a resolution "strongly disapprov[ing] of" the Ninth circuit decision. S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (enacted).

the most devastating periods in U.S. history, the War Between the States." *Id.*[6]

On November 13, 2002, Congress acted again to express the Nation's support for the Pledge. By votes of 401 to five in the House and 99 to zero in the Senate, Congress reenacted the Pledge of Allegiance—including the words "under God"—into law. The statute directs that "[i]n codifying this subsection, the Office of Law Revision Counsel shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades." Pub. L. No. 107–293, § 2(b), 116 Stat. 2057 (2002).

Finally, after the Ninth Circuit rejected the petitions for rehearing, the House adopted another resolution, by a vote of 400 to seven, again stating its position that the decision of the Ninth Circuit was erroneous and that the recitation of the Pledge of Allegiance is a "patriotic" act rather than a religious one. H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). The House resolution went on to urge this Court "to correct this constitutionally infirm and historically incorrect holding." *Id.* at H1977.[7]

In determining whether the issue presented for review here is sufficiently important to merit this Court's atten-

---

[6] The 1954 Congress explicitly considered the Establishment Clause in its debate on the amendment, and the legislators openly looked to the Supreme Court for guidance.

> The Supreme Court has clearly indicated that the references to the Almightly which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach v. Clauson* (343 U.S. 306, 312–313 [(1952)]). In so construing the first amendment, the Court pointed out that, if this recognition of the Almighly was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (id., 313).

H. REP. NO. 1693, at 3 (1954).

[7] The Senate also adopted a resolution, by a vote of 94 to zero, "strongly disapprov[ing] of" the decision. S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. March 4, 2003).

tion, the Court should also consider that the judgment below puts at issue an Act of Congress. *Cf. United States v. Gainey,* 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress"); *United States v. Bajakajian,* 524 U.S. 321, 327 (1998) (certiorari granted because "the Court of Appeals' holding . . . invalidated a portion of an Act of Congress"); *United States v. Edge Broad. Co.,* 509 U.S. 418, 425 (1993) (certiorari granted because "the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [Supreme Court] cases"). The fact that the Ninth Circuit's judgment puts an Act of Congress at issue makes review by this Court especially appropriate.

II. Conflict Between United States Courts of Appeal

This Court's review is also warranted here because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." SUP. CT. R. 10(a). Specifically, the Ninth Circuit's judgment directly conflicts with *Sherman v. Cmty. Consol. Sch. Dist. 21,* 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993), which holds that the Pledge may be recited in public elementary schools without violating the Establishment Clause.

Indeed, the Ninth Circuit itself recognized the inter-circuit conflict it had created. App. to Pet. for Cert. at 16a-17a. *See also* H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted) (The Ninth Circuit's judgment "will prohibit the recitation of the pledge at every public school in 9 states, schooling over 9.6 million students"). A situation in which public school students in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon and Washington may not recite the Pledge, and public school students in Illinois, Indiana and Wisconsin (as well as other states outside the Ninth Circuit) may, is untenable and merits the grant of certiorari by this Court.

III. Conflict With Statements of This Court

Finally, the grant of certiorari is also warranted because the Ninth Circuit's judgment conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c). While this Court has never ruled explicitly on the Pledge itself, the Court has repeatedly cited the Pledge as an example of the type of expression that is permissible under Establishment Clause jurisprudence.

In striking down the Pledge, the Ninth Circuit cited *Lynch v. Donnelly,* 465 U.S. 668, 676 (1984). App. to Pet. for Cert. at 38a–39a, 41a–44a. In *Lynch,* however, this Court actually stated that acceptable "examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by thousands of public school children—and adults—every year." *Lynch,* 465 U.S. at 676. The fact that *Lynch* uses the Pledge as an example of precisely the type of reference to the Nation's religious heritage that does not "establish[] a religion or religious faith," *id.* at 678, highlights the inconsistency of the Ninth Circuit judgment with opinions of this Court.

Similarly, in a case involving the constitutionality of a publicly-displayed creche and menorah, this Court used the Pledge as an example of what the Establishment Clause permits. *County of Allegheny v. ACLU,* 492 U.S. 573, 602–03 (1989). In *Engel v. Vitale,* 370 U.S. 421, 435 n.21 (1962), which held school prayer unconstitutional, this Court stated: "[N]othing in the decision reached here [] is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity." *See also id.* at 449 (Stewart, J., dissenting) (the Pledge, with the words "under God" added, is constitutional).

There are undoubtedly many individuals who wish religion had played no part in the founding and the history of this Nation. The reality, however, is that religion *has*

influenced this country's development, and this historical fact is reflected in various public rituals, symbols and expressions. This Court's case law makes it very clear that the Establishment Clause does not prohibit official government expression of the religious heritage, foundation and character of the United States, and that the Pledge of Allegiance is an example of the sort of expression that is constitutional. In this respect, the Ninth Circuit's judgment departs drastically from prior pronouncements by this Court.

CONCLUSION

For the reasons set forth herein, the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully urges that the Court grant the petitions for a writ of certiorari.

Respectfully submitted,

GERALDINE R. GENNET
General Counsel
Counsel of Record
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN
Senior Counsel
DAVID PLOTINSKY
Assistant Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel

Office of General Counsel
United States House of
Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225–9700

Counsel for Amicus Curiae

May 30, 2003